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September 28, 2015

**VIA E-MAIL TRANSMISSION
AND ECF FILING**

The Honorable Robert E. Gerber
United States Bankruptcy Judge
United States Bankruptcy Court
Southern District of New York
Alexander Hamilton Custom House
One Bowling Green
New York, New York 10004

**Re: In re Motors Liquidation Company, et al.
Case No. 09-50026 (REG)**

Letter Regarding Update on Related Proceedings

Dear Judge Gerber:

King & Spalding LLP is co-counsel with Kirkland & Ellis LLP for General Motors LLC (“**New GM**”) in the above-referenced matter. Pursuant to Your Honor’s Endorsed Order dated May 5, 2015 [Dkt. No. 13131], we write to update the Court regarding developments in proceedings relating to New GM’s Motions to Enforce. Specifically, on Friday, September 25, 2015, Lead Counsel filed a letter (“**September 25 Letter**”) in MDL 2543 informing Judge Furman that they filed with the Second Circuit Court of Appeals the *Ignition Switch Plaintiffs’ And Ignition Switch Pre-Closing Accident Plaintiffs’ Unopposed Motion For Redesignation As Appellants And Memorandum In Support*, dated September 25, 2015 (“**Redesignation Motion**”). A copy of the Redesignation Motion is attached to the September 25 Letter. A copy of the September 25 Letter, with the attached Redesignation Motion, is attached hereto.

Respectfully submitted,

/s/ Scott Davidson

Scott Davidson

Honorable Robert E. Gerber
September 28, 2015
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SD/hs
Encl.

cc: Edward S. Weisfelner
Howard Steel
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September 25, 2015

VIA ELECTRONIC COURT FILING

The Honorable Jesse M. Furman
United States District Court for the
Southern District of New York

Re: *In re: General Motors LLC Ignition Switch Litig.*, 14-MD-2543 (JMF)

Dear Judge Furman:

The Plaintiffs write to apprise the Court of the current status of the appeal from Judge Gerber's Decision and Judgment concerning the impact of the bankruptcy Sale Order on the various complaints now pending against New GM in this MDL and in other courts. When the Second Circuit took direct review of the appeal under 28 U.S.C. § 158(d)(2), the Plaintiffs wished to implement this Court's Order that the parties file a motion to expedite the appeal in the Second Circuit as quickly as possible. The Plaintiffs certainly share this Court's desire for the prompt and final resolution of the appeal.

However, when the Second Circuit took direct review of the appeal, it added the Plaintiffs (denominated as the "Ignition Switch Plaintiffs," and the "Ignition Switch Accident Plaintiffs") as *appellees*—aligned with New GM (whose interests are of course *adverse* to the Plaintiffs) and adverse to the Elliot Plaintiffs, represented by Mr. Peller (whose interests are essentially aligned with the Plaintiffs). The Plaintiffs timely filed notices of appeal from Judge Gerber's decision, but those notices have only recently been sent to the Second Circuit. After several phone calls with the Case Manager and Clerks at the Second Circuit, the Plaintiffs determined that it would be necessary to file a motion for redesignation. We then drafted and circulated that motion and recirculated revised drafts and conferred by correspondence and phone in a continuous effort to get all involved parties to agree. That unopposed motion, which we have filed today, is attached as Exhibit A to this letter.

We have also drafted and circulated to all involved parties a proposed joint motion to expedite the appeal, and the parties are discussing a proposed schedule and the content of the motion. This process has been delayed by the need for redesignation to ensure the proper alignment of the parties. Simply put, it is not possible to negotiate a proposed schedule without knowing which parties are appellants (and cross-appellees) and which parties are appellees (and cross-appellants).

The Honorable Jesse M. Furman
September 25, 2015
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The Plaintiffs regret the delay, and hope to have a motion to expedite on file as early next week as possible.

Respectfully submitted,

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-and-

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Exhibit A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-2844(L), 15-2847(con), 15-2848(con)

Caption [use short title]

Motion for: Redesignation as Appellants

Elliott, et al. v. General Motors LLC, et al. (In re
Motors Liquidation Co.)

Set forth below precise, complete statement of relief sought:

The Ignition Switch Plaintiffs and Ignition Switch Pre-Closing Accident Plaintiffs respectfully

request that this Court (1) designate them as appellants and allow them to submit briefing

simultaneously or along with the Elliott Plaintiffs, (2) direct the clerk of the bankruptcy court to

deliver the Moving Plaintiffs' appeals, including the corresponding statements of issues and

designations of the record, to the Second Circuit, and (3) docket the Moving Plaintiffs'

appeals so they can be heard in conjunction with the pending appeals.

MOVING PARTY: Ignition Switch Plaintiffs and Ignition Switch
Pre-Closing Accident Plaintiffs☒ Plaintiff☐ Defendant☐ Appellant/Petitioner☒ Appellee/Respondent

MOVING ATTORNEY: Elizabeth J. Cabraser

[name of attorney, with firm, address, phone number and e-mail]

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OPPOSING PARTY:
and other partiesGroman Plaintiffs; Participating Unitholders; Celestine
Elliott, Lawrence Elliott, Berenice Summerville; State
of Arizona, People of the State of California, acting by
and through Orange County District Attorney Tony
Rackauckas; Sesay Plaintiffs; Bledsoe Plaintiffs;
Wilmington Trust Company; General Motors LLCGary Peller; Steve W. Berman; Arthur Jay Steinberg; Andrew
Baker Bloomer; Richard C. Godfrey; Lisa H. Rubin; Aric H.
Wu; Gabriel Gillett; Adam H. Offenhardt; Daniel H. Golden;
Alexander H. Schmidt

OPPOSING ATTORNEY:

See Attachment A for a list of attorneys for other
parties

Court-Judge/Agency appealed from: U.S. Bankruptcy Court for the Southern District of New York/Judge Robert E. Gerber

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):



Yes



No (explain):

Opposing counsel's position on motion:



Unopposed



Opposed



Don't Know

Does opposing counsel intend to file a response:



Yes



No



Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?



Yes



No

Has this relief been previously sought in this Court?



Yes



No

Requested return date and explanation of emergency:

Is oral argument on motion requested?



Yes



No

(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?



Yes



No

If yes, enter date:

Signature of Moving Attorney:

/s/ Elizabeth J. Cabraser

Date: 9/25/2015

Service by: ☒ CM/ECF

Other [Attach proof of service]

Attachment A
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No. 15–2844

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

IN RE: MOTORS LIQUIDATION COMPANY,
Debtor,

IGNITION SWITCH PLAINTIFFS,
IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS,
Appellees,

CELESTINE ELLIOTT, LAWRENCE ELLIOTT, BERENICE SUMMERVILLE,
Appellants-Cross-Appellees,

GROMAN PLAINTIFFS
Appellees,

GENERAL MOTORS LLC,
Appellee-Cross-Appellant,

WILMINGTON TRUST COMPANY,
Appellee-Cross-Appellant,

PARTICIPATING UNITHOLDERS,
Creditors-Appellees.

**IGNITION SWITCH PLAINTIFFS’
AND IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS’
UNOPPOSED MOTION FOR REDESIGNATION AS APPELLANTS
AND MEMORANDUM IN SUPPORT**

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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*Co-Lead Counsel and Designated Bankruptcy Counsel for
the Ignition Switch Plaintiffs and
the Ignition Switch Pre-Closing Accident Plaintiffs*

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CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is required for the Moving Plaintiffs, each of whom is an individual and not a corporate entity.

The Ignition Switch Plaintiffs and Ignition Switch Pre-Closing Accident Plaintiffs¹ (collectively, “Moving Plaintiffs”), by and through their undersigned counsel, respectfully submit this *Unopposed Motion for Redesignation as Appellants*.² The Moving Plaintiffs seek relief from this Court’s Order granting permission to the Moving Plaintiffs to intervene in the direct appeal of the bankruptcy court’s decision regarding the impact of General Motors’ 2009 bankruptcy and resulting Sale Order on current civil cases against the post-bankruptcy General Motors LLC (“New GM”).³ See Case No. 15-1958 (L), Dkt. No. 106.

The Moving Plaintiffs have asserted damages claims (including under federal civil RICO and state statutory and common-law fraud) against New GM in the federal multidistrict litigation.

The Ignition Switch Pre-Closing Accident Plaintiffs have sued New GM as the successor to General Motors Corp. (“Old GM”) for personal injury, wrongful

¹ Capitalized terms not otherwise defined in this document have the meanings given in the bankruptcy court’s Decision of April 15, 2015. See *In re Motors Liquidation Co.*, Case No. 09-50026 (REG) (Bankr. S.D.N.Y.) (Dkt. No. 13109).

² The other parties to these proceedings do not oppose the relief sought by Moving Plaintiffs in this Motion—designating and treating the Moving Plaintiffs as appellants in these proceedings in all respects, including by integrating their statements of issues and designations of the record on appeal into these proceedings. New GM, the GUC Trust, and the other parties, however, do not take any position as to the representations or arguments made in these Motion papers. See Section III.A *infra*.

³ See Section II.A *infra*, defining party names.

death, and other claims arising from pre-sale accidents involving motor vehicles manufactured by Old GM.

The Moving Plaintiffs' claims overlap substantially with the claims of the individual litigants who are presently designated as "appellants" in this appeal, as discussed below. Because *all* plaintiffs are adversaries with New GM, *all* plaintiffs belong opposite New GM in these appeals (and opposite the Unitholders, given they won on issues adverse to Moving Plaintiffs).

Consequently, the Moving Plaintiffs ask that this Court ensure that briefing proceeds in an orderly fashion by designating the Moving Plaintiffs as appellants rather than appellees (or, alternatively, and with the same result, deeming previously-filed motions filed by Moving Plaintiffs as direct appeals). Moving Plaintiffs also seek the related relief that the Moving Plaintiffs' statements of issues and designations of the record on appeal, both of which the Moving Plaintiffs had previously (and timely) filed in the bankruptcy court, be deemed the statements of issues and designations of the record on appeal for Moving Plaintiffs as appellants.⁴ See Dkt. Nos. 13236; 13299.⁵

⁴ Specifically, Moving Plaintiffs request that the Second Circuit direct the clerk of the bankruptcy court to deliver the Moving Plaintiffs' appeals to the Second Circuit and for the Second Circuit to docket the Moving Plaintiffs' appeals so they can be heard in conjunction with the pending appeals.

As grounds for this Motion, the Moving Plaintiffs state the following:

I. Rules Governing Appeals from U.S. Bankruptcy Courts

As an initial matter, to appeal a bankruptcy court order or judgment (such as the order at issue here), an appellant must file a notice of appeal with the bankruptcy court within 14 days of the entry of the judgment or order. Fed. R. Bankr. P. 8002(a), 8003(a)(1). “An appellant’s failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal” Fed. R. Bankr. P. 8003(a)(2).

For an appeal to proceed directly in the court of appeals rather than the district court, it must be certified, either by the bankruptcy court or by agreement of the parties, pursuant to 28 U.S.C. § 158(d) and Bankruptcy Rule 8006(c)-(f). A certification becomes effective only after: (a) it is filed with the clerk; (b) a timely notice of appeal has been filed in the bankruptcy court; and (c) the notice of appeal has taken effect upon the disposition of any post-judgment motions. Fed. R. Bankr. P. 8006(a)-(b).

After the certification becomes effective, “a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk.” Fed. R. Bankr. P. 8006(g). That request need not be filed by *all* appellants—or even by the

⁵ Except where otherwise indicated, references to “Dkt. No. __” are to docket entries in the bankruptcy court proceedings: *In re Motors Liquidation Co.*, Case No. 09-50026 (REG) (Bankr. S.D.N.Y.).

appellant at all. *See, e.g.,* 10 *Collier on Bankruptcy* ¶ 8006.07 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (rule “does not identify the entity that is to make and file the request” for a direct appeal).⁶

II. Relevant Factual and Procedural Background

Multiple different groups of plaintiffs are suing New GM for economic losses or personal injuries.

On June 9, 2014, the Judicial Panel on Multidistrict Litigation ordered numerous economic loss class action lawsuits against New GM as well as individual personal injury/wrongful death lawsuits against New GM to be transferred to the United States District Court for the Southern District of New York for consolidated pretrial proceedings. *See In re GM Ignition Switch* (“MDL”), Case No. 14-md-2543-JMF (S.D.N.Y.) (Furman, J.).⁷

A. The Parties Bringing This Motion and Other Relevant Parties.

The “Ignition Switch Plaintiffs” represented by Co-Lead Counsel on behalf of a proposed nationwide class are suing New GM for economic losses for issues relating to the Ignition Switch Defect and other defects. In the consolidated class

⁶ Illustrating this, the request even can be filed by an appellee that prefers that the appeal proceed in the court of appeals rather than the district court. *Hundley v. Marsh (In re Hundley)*, 603 F.3d 95, 97-98 (1st Cir. 2010).

⁷ *See* Transfer Order, *In re GM Ignition Switch Litig.*, MDL No. 2543 (Dkt. No. 266) (J.P.M.L. June 12, 2014); Order No. 1, *In re GM Ignition Switch* (“MDL”), No. 14-md-2543-JMF (S.D.N.Y.) (Dkt. No. 19), at 1.

action complaint that they have filed in the district court, the Ignition Switch Plaintiffs and the other plaintiffs (together, “Putative Class Plaintiffs”) seek relief for all class members. The consolidated complaint that Putative Class Plaintiffs have filed is the operative class complaint in the district court. *See* Dkt. No. 249, Case No. 14-md-2543-JMF (appointing lead counsel and detailing their duties in representing the putative class); Dkt. No. 1024 (deeming Putative Class Plaintiffs’ complaint as the operative class action complaint in the proceedings before the MDL court).

Certain individual putative class members in the economic loss class case, the “Elliott Plaintiffs” (Celestine Elliott, Lawrence Elliott, and Berenice Summerville), are separately represented in this appeal and, of relevance here, are the plaintiffs who filed the first direct appeal of the bankruptcy court’s Decision. For this reason, the Elliott Plaintiffs are currently designated as “appellants.”

The “Ignition Switch Pre-Closing Accident Plaintiffs” are suing New GM for motor vehicle accidents caused by the Ignition Switch Defect.

The States of California and Arizona have each filed complaints against New GM seeking civil penalties, injunctive and related relief arising from New GM’s alleged violations of the respective States’ consumer protection laws.

The Motors Liquidation Company GUC Trust (the “GUC Trust”) benefits certain creditors of Old GM. The “Participating Unitholders” are a subgroup of

these creditors; Wilmington Trust Company acts as the GUC Trust's trustee and administrator (collectively, these are the "GUC Parties"). They, along with New GM, are the true appellees to Moving Plaintiffs' appeal because these parties prevailed on certain issues against the Moving Plaintiffs in the bankruptcy court's Decision and Judgment.

B. Bankruptcy Court Proceedings and Notices of Appeal.

In June 2009, General Motors LLC filed a Chapter 11 bankruptcy petition. *See In re Motors Liquidation Co.*, Case No. 09-50026 (Bankr. S.D.N.Y.) (Gerber, J.).

In July 2009, the bankruptcy court entered a Sale Order that, among other things, detailed certain liabilities of New GM. The interpretation of the Sale Order is at issue in the Decision and Judgment that are the subject of this appeal. The bankruptcy court's Decision on Motion to Enforce Sale Order ("Decision") was entered on April 15, 2015, and the judgment and certificate for direct appeal were entered on June 1, 2015. Dkt. Nos. 13109 (Decision), 13177 (Judgment), 13178 (Certificate).

As part of the Certificate, Judge Gerber ordered the bankruptcy clerk not to transmit the Record on Appeal or any associated documents until the Second Circuit decided whether to hear the appeal. *See* Dkt. No. 1 ¶ 6. (As a result, and for that reason, the Moving Plaintiffs' appeals have not been docketed in either the

district court or the Second Circuit.)

The same day that the court entered the Judgment and Certificate, the Elliott Plaintiffs, by Attorney Gary Peller, filed a notice of appeal. Dkt. No. 13179.

The Ignition Switch Plaintiffs (Dkt. No. 13185) and the Ignition Switch Pre-Closing Accident Plaintiffs (Dkt. No. 13194) filed timely notices of appeal on June 2 and 10, respectively. Both sets of Moving Plaintiffs thus filed in advance of when New GM and the GUC Parties filed their cross-notice of appeal, on June 12 and 15, respectively. Dkt. No. 13200 (New GM); Dkt. No. 13204 (GUC Parties). But, as stated above, these appeals have not been docketed.

After Judge Gerber denied a motion for post-Judgment relief on July 22, (Dkt. No. 13313), the State of California (Dkt. No. 13333) and the State of Arizona (Dkt. No. 13335) filed timely notices of appeal. These appeals, too, have not been docketed.

C. Proceedings in the Second Circuit.

On June 18, the Elliott Plaintiffs filed a Petition for Permission to Appeal in this Court. *See* Case No. 15-1958, Dkt. No. 1.

The Moving Plaintiffs did not at that time file a petition in the Second Circuit Court of Appeals, intending instead to file appeal papers in the United States District Court for the Southern District of New York.

On June 29, 2015, New GM filed a combined opposition to the Elliott

Plaintiffs' petition and (conditioned upon this Court's granting the Elliott Plaintiffs' petition) petition to cross-appeal. Case No. 15-2079, Dkt. No. 1. On July 2, the GUC Trust filed a similar combined opposition/conditional petition to appeal. Case No. 15-2131, Dkt. No. 1.

On June 30, the Moving Plaintiffs timely moved to intervene in the Elliott Plaintiffs' petition proceeding in order to oppose the petition. *See* Case No. 15-1958, Dkt. Nos. 21, 24. The Moving Plaintiffs likewise timely moved to intervene on substantially the same grounds in New GM's and the GUC Trust's respective petition proceedings. Case No. 15-2079, Dkt. No. 20; Case No. 15-2131, Dkt. No. 18.

On August 12, the Moving Plaintiffs filed a letter stating that they no longer opposed a direct appeal to this Court. *See* Case No. 15-2131, Dkt. No. 36.

On September 9, this Court granted all of the petitions for direct appeal and allowed the Moving Plaintiffs to intervene. The Court designated the Elliott Plaintiffs as appellants and cross-appellees (to New GM's and the GUC Parties' appeals), the Moving Plaintiffs as appellees (to the Elliott Plaintiffs' appeal), and New GM and the GUC Parties as appellees (to the Elliott Plaintiffs' appeal) and cross-appellants (based on their cross-notice of appeal and subsequent cross-petitions). Dkt. No. 15-1958, Dkt. No. 106.

On September 16, 2015, the States of Arizona and California jointly filed in

this Court a motion to intervene as appellants.

III. Argument

A. All Parties to the Appeal Agree That the Moving Plaintiffs Are Appellants and Should Be Designated As Such.

This Court's Rules provide that "designations may be modified by the parties' agreement" Fed. R. App. P. 28.1(b). The undersigned have conferred with counsel for all other parties to these proceedings, as well as counsel for the proposed intervenors State of Arizona and People of the State of California, and confirmed that these parties agree to the relief sought in the present Motion: the designation and treatment of the Moving Plaintiffs as appellants, including by incorporating their statements of issues and designations of the record (duly filed in the bankruptcy court) into these proceedings. Counsel for the other parties take no position as to any of the argument or representations in this Motion. All counsel have confirmed that they do not intend to file any response to this Motion. *See* Fed. R. App. P. 27.1(b).

Because the Rules provide that designations may be modified by agreement and the parties are in such an agreement, the Moving Plaintiffs ask that this Court redesignate them as appellants.

B. Redesignation Is Allowed as a General Matter, and Necessary Here for an Orderly and Logical Briefing Sequence.

The rules governing this proceeding provide that "designations may be modified . . . by court order." Fed. R. App. P. 28.1(b); see generally Charles Alan

Wright & Arthur R. Miller, 16AA Fed. Prac. & Proc. Juris. § 3974.10 (4th ed. 2015) (“the party who files the second notice of appeal [may] raise [issues for appeal] that are more numerous or weighty than the party who files the first notice, and thus it may make sense to treat the second party as the appellant and the first party as the appellee. Rule 28.1(b) authorizes . . . the court by order to modify the default designations in the rule.”)

Prior to the passage of Rule 28.1(d) in 2005, courts redesignated parties by relying on Fed. R. App. P. 2, which allows courts to “suspend any provision of these rules in a particular case and order proceedings as it directs”, and/or on their inherent powers as reflected in (but not limited by) that Rule. *See, e.g., Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1035 (8th Cir. 2002) (realigning parties based on the parties’ positions in the substance of the dispute).

Rule 2 thus also supports an alternative basis for granting the relief that the Moving Plaintiffs seek, namely, construing the Moving Plaintiffs’ prior filings (i.e., the intervention motion and subsequent letter informing the Court that the Moving Plaintiffs no longer opposed a direct appeal) as a petition for a direct appeal and then treating that petition as granted. *See In re Turner*, 574 F.3d 349, 352–54 (7th Cir. 2009) (Posner, J.) (holding, in the context of an appeal of a bankruptcy court order, that the requirement to file a petition for leave to appeal is not jurisdictional; appellate court may overlook technical infirmities so long as the

party seeking relief has provided the court with the correct substantive information); *see also* Fed. R. Bankr. P. 8003(a)(2) (indicating that only jurisdictional bar to hearing bankruptcy appeals is failure to file notice of appeal).

Overall, either redesignating the Moving Plaintiffs as appellants, or construing the Moving Plaintiffs' prior papers as bringing a direct appeal, conforms the Moving Plaintiffs to be appellants, putting the parties in their proper positions in terms of their stance in this appeal. The MDL court designated the undersigned as lead counsel in the MDL proceedings and ruled that the consolidated complaint filed by the undersigned is the operative one in the MDL proceedings. *See* Dkt. No. 1024, Case No. 14-md-2543-JMF. All Plaintiffs are, moreover, united in interest and position in these proceedings: all took timely action to appeal, and all seek review of and relief from the bankruptcy court's Decision. All are, functionally, appellants. All should be designated as appellants.

CONCLUSION

For the foregoing reasons, this Court should designate the Moving Plaintiffs as appellants in this appeal and allow them to submit briefing simultaneously or along with the Elliott Plaintiffs. As part of this relief, Moving Plaintiffs respectfully request the Second Circuit to direct the clerk of the bankruptcy court to deliver the Moving Plaintiffs' appeals, including the corresponding statements of issues and designations of the record, *see* Dkt. Nos. 13236; 13299, to the Second

Circuit and for the Second Circuit to docket the Moving Plaintiffs' appeals so they can be heard in conjunction with the pending appeals.

Dated: September 25, 2015

Respectfully submitted,

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